against the defendant, because it is for the jury to make findings on that issue.

Story Parchment Co. v. *Patterson Co.*, 282 U. S. 555, 563, 566.

The reasons actuating the respondents and the distributors in denying distribution to petitioner were for the jury to determine, *Eastman Kodak Co.* v. *Southern Photo Material Co.*, (Cir. 5) 295 Fed. 98, 102; this Court's decision 375 U. S. 359, 375.

Aside from the fact that the alleged falsity of petitioner's stock prospectus was not shown to have been known to the distributors or to have influenced their actions, it was, in any event, not matter of dissent for the respondents, for no wrongful conduct of petitioner could legalize their conspiracy or immunize them against liability to those they injured, including petitioner.

Kiefer-Stewart Co. v. *Seagram & Son*, 340 U. S. 211, 214.

Testimony of Frank Riggio, as president of a small tobacco manufacturer, commencing business at the same time as petitioner, should have been admitted for purposes of comparison.

American Can Co. v. *Ladoga Canning Co.*, (Cir. 7) 44 F. 2d 763, 769-770.

Professor Tennant's testimony, including his exhibits, should not have been stricken from evidence, because he was an "expert" within the rules laid down by the cases,

Farris v. *Interstate Circuit,* 116 F. (2d) 409,
Empire Oil & Refining Co. v. *Hoyt,* 112 F. (2d) 356,
Congress & Empire Spring Co. v. *Edgar,* 99 U. S. 645,
Shipley v. *Pittsburgh & L. E. R. Co.,* 83 F. Supp. 772,
Bratt v. *Western Airlines,* 155 F. (2d) 850, cer. den. 328 U. S. 735,
Phillips Petroleum Co. v. *Payne Oil Corp.,* 146 F. (2d) 546,
United States v. *Aluminum Co. of America,* (U. S. D. C. S. D. N. Y.) 35 F. Supp. 820, 823 to 825 inclusive,
Baltimore American Insurance Co. of N. Y. v. *Pecos Mercantile Co.,* 122 F. (2d) 143,
Western Coal & Mining Co. v. *Beberich,* 94 Fed. 329,
Builders Steel Co. v. *Commissioner of Internal Revenue,* 179 F. (2d) 377.

Though petitioner maintains that, even without facts by estoppel, its evidence was sufficient for the jury, the trial court should have received in evidence the estoppel facts offered by petitioner under the Lexington Judgment before considering dismissal of the question on the merits.

VI.

The cases cited by the court below in its opinion are inapposite, and the decision of this Court in the *Emich* case does not hold that direct evidence is essential to establish impact of the conspiracy on a treble-damage plaintiff.

VII.

To require more meticulous proof than the Record discloses would amount to holding that the skillful concealment of the respondents and distributors is an invincible barrier to proof.

United States v. *Johnson,* 318, U. S. 503, 517-518.

VIII.

In considering the motion to dismiss petitioner's complaint, the court below should have recognized that the Sherman Act directs itself against the "dangerous probability" that the respondents conspired to exclude competitors, their power and intent to do so being present and every inference fairly deducible from the fact should have been made in favor of petitioner.

United States v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 226 n,

Bank of United States v. *Carneal,* 2 Pet., 543, 7 L. Ed. 513.

CONCLUSION.

By its evidence *de novo* petitioner made a *prima facie* case. As a result of their conviction at Lexington respondents were "normally, collaterally estopped to deny" (*Frost* v. *Bankers Commercial Corp.* (2 Cir.), 194 F. 2d, 505, 507; R. 4293) their conspiracy, power and intent to control distribution of tobacco products and exclude competitors. On all of the evidence, including the uniform refusal of the distributors to handle petitioner's products, the question of petitioner's exclusion by the respondents was clearly before the jury for determination, and dismissal of petitioner's complaint on the merits was erroneous invasion of the jury's province.

Because of the substantial question of general importance presented and the errors of the courts below, this Court should issue the writ prayed for by petitioner.

Respectfully submitted,

PHILIP HANDELMAN,
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Of Counsel

OCT 17 1952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 339

MONTICELLO TOBACCO COMPANY, INC.,

Petitioner,

v.

THE AMERICAN TOBACCO COMPANY, AMERICAN SUPPLIERS, INC., PAUL M. HAHN, VINCENT RIGGIO, LIGGETT & MYERS TOBACCO COMPANY, JAMES W. ANDREWS and WILLIAM A. BLOUNT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS THE AMERICAN TOBACCO COMPANY, AMERICAN SUPPLIERS, INC., PAUL M. HAHN AND VINCENT RIGGIO

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Opinion Below

The opinion of the Court of Appeals, Second Circuit (4289-4297)* is reported in 197 F. 2d 629. No opinion was written by the District Court.

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* Unless otherwise stated, references in parentheses are to pages of the record and italics are ours.

Jurisdiction

Jurisdiction to grant certiorari herein exists under Chapter 646 of the Laws of June 25, 1948, 62 Stat. 928, 28 U. S. C. §1254 (1), rather than under the prior statute cited in the petition (28 U. S. C. §347 (a)).

Questions Presented

Petitioner has stated, as questions involved in the case, questions which are not genuinely involved at all.

Petitioner's questions I (a) and III (f) represent that the lower courts held that petitioner must establish by *direct,* as distinguished from *circumstantial,* evidence the causal connection between respondents' conspiracy, evidenced by a prior conviction, and the refusal of distributors to deal with petitioner. No such burden was imposed on petitioner. The courts below did not so hold and no such proposition was urged by respondents. These questions derive solely from a sentence in the opinion below in which "direct evidence" was used in an altogether different context.

Petitioner's question I (c) represents that the court below held that petitioner had the burden of proving, as part of its *prima facie* case, that respondents caused the actual exclusion from the market of competitors other than petitioner. No such proposition was urged by respondents below, nor made a basis for decision by either court. It is unsupported by the record.

Two main questions are presented by the record:

I. The extent to which the judgment of conviction of respondents in the prior criminal case afforded petitioner *prima facie* proof of its case.

The judgment in the prior action was received in evidence and respondents contend that the lower courts, applying the rules established by this Court in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, afforded petitioner the maximum evidentiary benefit to which it was entitled.

II. The propriety of the trial court's dismissal of the action after the petitioner had completed the presentation of its evidence upon the ground that upon the facts and the law petitioner had shown no right to relief.

Respondents contend that the dismissal was required under settled rules of this Court and the Court of Appeals because, on all of petitioner's evidence, any inference that respondents had caused distributors to refuse to deal with petitioner could not rationally be supported.

All the other questions stated by petitioner are incidental questions relating to the admissibility of evidence, which could be suitable for review only by the court below, and which are academic here because the evidence excluded could not affect the result reached by the courts below.

Statement of the Case

As the petition here states, petitioner's "claim in substance" is that respondents "caused" distributors of tobacco products "to refuse to buy, deal in or accept for distribution petitioner's at least equally good quality, non-burley, salable cigarette with the result that petitioner was prevented from competing with the respondents and was forced to suspend its operations" (Pet., p. 10). Its "Statement of Case," however, gives an erroneous and dis-

torted impression of the record as to petitioner's management, product and efforts.

According to the petition, petitioner was a company with a cigarette of "fine quality," with a president who "had long experience in the tobacco industry in various capacities," and with arrangements "with several long-experienced tobacco and cigarette salesmen" to promote its products.

The impression given is that the venture failed despite persistent efforts over two years to secure distribution of its cigarettes, which met with uniform refusal of distributors of tobacco products. The uncontroverted evidence brought out during petitioner's own case dispels any such impression.

The petitioner corporation was formed in 1938 by Richard Hartley, who became its president and principal stockholder. It issued 75,000 shares of stock, of which 58,334 were issued to Hartley for a nebulous consideration (2114, 2496-2503; Exs. K, P). The remaining shares were sold at $2.00 a share on the basis of a false and fraudulent prospectus by a broker specializing in securities exempt from registration under the Securities Act (1964, 2296, 2345-6, 2577-8, 4268, 4292). From this petitioner derived a total of $24,999, out of which Hartley took $8,300 as advances against his share of "net earnings" which were never realized (2346; Ex. 133).

With respect to Hartley, the petition avers, "There was also uncontroverted evidence of his experience with the buying and selling of leaf tobacco" (p. 29). But no tobacco company ever employed Hartley to buy tobacco (2369), and after the age of 19 (30 years before petitioner was incorporated) he had no connection with the manufacturing or growing of tobacco (2121, 2363, 2602).

At the trial Hartley testified as to experience in the leaf tobacco business during the period 1922 to 1925 at Norfolk, Virginia (2383-5). On cross-examination this testimony was shown to be false, Hartley admitting that from March 13, 1923 to May 23, 1925 he was incarcerated in the Lorton Reformatory at Lorton, Virginia, serving a sentence for grand larceny (2480-3).

The petition also refers to uncontroverted evidence of Hartley's experience with the "retail merchandising of leaf tobacco products" (p. 29). The record shows the following:

Hartley operated three retail cigar stores in Washington, D. C. which he regarded as "a continuous business" (2624). The first store he acquired on his arrival in Washington in 1909, at the age of 20 (2373). He gave it up in 1917 and took over a store at 1300 F Street which he said "had failed in business, I believe, or about to," by assuming a debt of some $3,800 (2378-80). This second store was closed on May 1, 1920 (2380, 2585). Hartley admitted that about 1919 his earnings had "just about stopped altogether" (2762). He opened a third store on G Street in 1921 (2381). On August 4, 1921, a petition for appointment of receivers was filed in connection with the foreclosure of a chattel mortgage on the stock and fixtures of the last store (Ex. Z). There were insufficient funds for the payment of creditors (Ex. X).

Hartley arrived in New York City in the early summer of 1925, and worked from time to time at various cigar stores or stands as a clerk behind the counter (2001, 2388-90). From February to June 1928, he operated a "luncheonette, candy and cigar store" through a corporation called Hartley Court, Ltd. which Hartley then put into bankruptcy (Ex. I; 2220-4, 2234-5, 2391-2).

The petition refers to Hartley's "1931 promotion of the Court cigarette, of which Faber, Coe & Gregg and other jobbers who in 1939 and later refused distribution to Monticello cigarettes, had bought substantial quantities" (p. 29). The petition avers that "Hartley withdrew the Court cigarette from the market because the formula was not what he had expected and he was not satisfied with the package" (p. 29).

The facts with respect to the Court cigarette were that in or about 1929, Hartley purchased 500,000 Court cigarettes—2500 cartons—which were manufactured for him by The American Tobacco Company (2486-7). He accounted for the sale of part of these, and others were given away (2499). In 1932 he sold all right, title and interest in this business for $125 (Ex. P; 2503).

In the interval between 1932 and 1938, when Hartley organized Monticello Tobacco Company, Inc., he engaged in no phase of the tobacco business (2517). During this period he was unable to account with any exactness as to his whereabouts (2517, 2629-34) other than that he spent the six-year period traveling around the country "making good-will" with tobacco retailers by using the unsatisfactory Court package and cigarettes "as a sort of calling card" (2515-8).

The petition alleges that "petitioner arranged with several long-experienced tobacco and cigarette salesmen to promote the sale of Monticello cigarettes and smoking mixture" (p. 31).

The books of the corporation showed a total of $82 paid for the salaries of three salesmen, none employed for more than two weeks (Ex. 124). Another, Boylston, gratuitously devoted a few hours a day in 1939 attempting

to sell Monticello cigarettes to retailers (1468-9, 1486), but never went on the payroll or received any salary (1486, 2128).

The petition, under the headings "Sales Promotion of Petitioner's Cigarette" and "Refusal of the Jobbers to Give Petitioner Distribution" (Pet., pp. 31-2), describes what are summed up as "endeavors to secure distribution of its Monticello cigarettes and smoking mixture over a period of more than two years, which met with uniform refusal by the distributors" (p. 39).

In fact, Hartley, who was the principal in this venture, made no sustained efforts to persuade distributors to handle Monticello cigarettes. He bought a small quantity of cigarettes—2,000 cartons—from a St. Louis manufacturer. According to the manufacturer, there was nothing special about these cigarettes (3008) to make them different from other general blends of flue-cured and Turkish tobaccos such as Benson and Hedges, Virginia Rounds and the original Sweet Caporals (3010, 3017).

Hartley proposed, however, that retailers sell these cigarettes at a premium of 3¢ a package over the price of popular brands. Petitioner's prospectus had stated that it was not "its purpose or intention * * * to compete with the current popular brands of cigarettes" (Ex. K). He proposed to do no advertising and he had no real sales force. His plan was to attempt to persuade distributors to promote these cigarettes by their own efforts (Ex. K).

Actually, Hartley made a few attempts in 1939 and again in 1940 to get jobbers to handle his cigarette. None of these efforts was intensive. Of the 6,000 distributors in the country, Hartley, according to his testimony, visited only 7 jobbers in 1939 and 6 in 1940 (2012-93). One of

these bought (2012); the others did not. Hartley's efforts in 1940 marked the end of his attempt to place these cigarettes with jobbers.

The petition emphasizes "orders" to jobbers which Hartley is supposed to have obtained from retailers (Pet., pp. 35-7). Although petitioner's witnesses Boylston and Hollingsworth testified that in the trade orders are customarily signed by the retailer (1489, 3532-3), Hartley's "orders" were not so signed; they were not even on regular order blanks but rather on ordinary pieces of paper on which Hartley wrote names, locations and amounts of merchandise (1995-6, 1998-9).

Unable to enlist jobbers' assistance, Hartley's next procedure should have been, as described by petitioner's witness Hollingsworth, to sell as many cigarettes as possible to retailers (3356). Hartley did visit retail outlets and place cigarettes at some of them. However, except in a few instances, after an initial order or two he refused to supply them again (2083-4, 2061). In 1940 he approached certain large chain stores, some of which purchased small quantities (2094-2104; Exs. 132, 152).

Petitioner continued to make some sales, but not in any volume, to June, 1941, when its books closed (Ex. 132).

In October, 1941, the respondents and others were convicted of violations of the anti-trust laws in a trial in the United States District Court for the Eastern District of Kentucky at Lexington, Kentucky, which is referred to as the "Lexington case." Petitioner seized upon this coincidence as an opportunity to convert its failure into a financial windfall and commenced this action in 1946, immediately after the final disposition by this Court of the Lexington case.

Petitioner states that its complaint was "predicated" on the respondents' prior conviction in the Lexington case (Pet., p. 11). But there was no allegation in the Information or issue raised in the Lexington case that the respondents had caused distributors to refuse to handle any competing products, the products of petitioner or anyone else. Nor was petitioner in any way involved or mentioned in the Lexington case.

Quite apart from its repetition of the Lexington Information allegations, therefore, petitioner complained in this case that, as the "direct result" of respondents' conduct, distributors "refused to accept" and "refused to distribute" its products (18-20, 25, 27, 30-1).

At the outset of the trial, petitioner recognized the necessity of offering independent proof connecting the petitioner with the conspiracy evidenced by the prior conviction. Its counsel stated (129):

> "Mr. Handelman: • • • We say the allegation that they violated law X is established prima facie by the judgment. Now that is not conclusive. That does not even go so far as to say it gives us a prima facie case because to have a prima facie case we must establish (1) that they violated the law which we do by this prima facie evidence; (2) *that that violation had a certain impact upon us, direct;* and, (3) that because of the impact of that violation we suffered damage. Failing in any one of those three we would have no prima facie case."

At the trial, however, petitioner offered no evidence that respondents caused jobbers to refuse to handle petitioner's cigarette.

Petitioner called representatives of only two jobbers as witnesses. One, the president of Metropolitan Tobacco Company, testified that his firm had decided not to buy

Monticello cigarettes because they "felt and decided that Monticello cigarettes would not give us sufficient volume" and did not have, in their opinion, "much chance for success"—they felt that they "couldn't make any money on the product" (1814). The other, Faber, Coe & Gregg, did order cigarettes from petitioner—it did not refuse to handle them (2012, 1675-8; Exs. E, 132).

In addition, petitioner called six retailers who had sold small quantities of Monticello cigarettes but they did not testify to any causal connection between the respondents and petitioner's failure.

At the outset of the trial, respondents contended that the judgment in the Lexington case could not be admitted as *prima facie* evidence of a conspiracy by the respondents to cause distributors to refuse to handle petitioner's products for reasons discussed *infra* in this brief under "Argument."

It was necessary for the trial judge in this case, in accordance with the direction of this Court in *Emich Motors Corp.* v. *General Motors Corp.*, to determine from the record in the Lexington case what questions were put in issue and determined. This was done. After reading all material referred to him by petitioner's counsel, the trial judge found no evidence in the Lexington case of any attempt by defendants to induce distributors not to carry any competing product.

The trial judge first ruled that as a matter of order of proof he would exclude the judgment of conviction in the Lexington case at the beginning, without prejudice to petitioner's reoffering it later. However, he finally admitted the Lexington judgment in evidence, pointing out to the jury that it did not by itself establish the petitioner's claim in this case.

Much of the ten and a half weeks' trial was taken up with a review of some of the testimony and exhibits which had been offered in the Lexington case. This proof consisted of the petitioner's calling as witnesses individual defendants who had been convicted at Lexington and having them repeat testimony given there, and of offering the record of testimony of other convicted defendants, together with copies of a large number of exhibits which had been put in evidence at the Lexington trial.

None of these exhibits concerned petitioner and the witnesses gave no testimony with respect to it or its claim that the respondents caused distributors to refuse to deal with it.

Respondents were shown to have little, if any, knowledge of petitioner. The testimony of Hahn, American's President, Riggio, former Board Chairman and President of American, Andrews, former Liggett President, and Few, present Liggett President, showed no prior knowledge at all of petitioner except that Riggio had a recollection that someone, possibly his son, had sent him a copy of petitioner's advertising circular entitled "Statement of Facts", referred to on page 24 of the petition (Ex. 2-A; 654-665).

At the close of petitioner's case, this action was dismissed, since the trial court found that on the basis of all the evidence "it would be to the last degree irrational for this jury or any jury to conclude from the evidence here that the distributors' refusal to deal with Monticello was caused by these defendants" (4284). The Court of Appeals, reviewing the entire record, has affirmed, concluding— "Absent a showing of causal connection between the collusion and jobbers' refusals to handle plaintiff's products, dismissal was mandatory" (4297).

Argument

Nothing urged by petitioner supports its conclusions that there has been a "wide departure from the established procedure" in treble-damage cases or that this case "raises important general questions of law under the antitrust statutes, and under prior decisions of this Court, which have been misconstrued or entirely ignored" (Pet., pp. 9-10, 51).

No prior decision of this Court has been misconstrued or ignored and there is no general question of federal law which requires further decision. In *Emich Motors Corp.* v. *General Motors Corp.*, 181 F. 2d 70, the Court of Appeals for the Seventh Circuit reversed judgments for plaintiffs on a number of grounds, including the effect to be given to a conviction in an antecedent action. This Court granted certiorari, but limited its review "to important questions as to the scope of §5 of the Clayton Act" (340 U. S. 558, 560; see also 340 U. S. 808, rehearing denied 340 U. S. 894). This Court then established clear rules governing the application of §5 and these rules have been punctiliously followed by the courts below. The dismissal of petitioner's action resulted not from any misinterpretation of those rules but from the deficiencies of the proof petitioner offered in support of its own individual case.

None of the other questions urged by petitioner—including those not genuinely presented by the record here—involves any federal statute. Petitioner claims conflict with decisions of this Court and of Courts of Appeals in other Circuits by a rule requiring it to prove its case by direct rather than circumstantial evidence (Pet., pp. 9-10, 49-50), but the claim falls with the demonstration that no such rule was applied and no such burden imposed on peti-

tioner. In all other respects the courts below similarly applied only established rules of law requiring petitioner to sustain its affirmative burden by competent proof.

This case presents no "special" or "important" reasons or any other grounds for review by this Court on writ of certiorari, such as stated in Rule 38 (5).

I. Neither Court Below Required Petitioner to Prove Any Part of Its Case By Direct As Distinguished From Circumstantial Evidence

Petitioner's Specifications of Errors in this Court specifies that the Court of Appeals held that petitioner, as to those matters not determined by the Lexington judgment, "had to adduce direct evidence, and could not rely on circumstantial evidence" (Pet., p. 42, par. 1). Its petition and brief labor an illusory point (e.g., Pet., pp. 2, 9, 42-43, 49-50; Br., pp. 54, 56).

The simple answer is that the Court of Appeals did not so hold and no such burden was imposed on petitioner. Concededly, a plaintiff in a conspiracy action may prove conspiracy by circumstantial evidence. This has long been elementary, as the cases cited by petitioner show (Br., p. 56). Of course, Judge Clark, who wrote the opinion of the court below, recognized the rule. He had said in an earlier treble damage action (*Bordonaro Bros. Theatres* v. *Paramount Pictures,* 176 F. 2d 594, 596-597):

> "Obviously a conspiracy such as was here charged rarely can be proved by direct evidence from the participating parties themselves; reliance must be had upon the reasonable inferences drawn from their conduct in the light of the surrounding circumstances."

There has been no departure from this settled rule and petitioner was not denied any reasonable inferences from circumstantial evidence. The basic question was whether respondents had in some way caused tobacco distributors to refuse to handle petitioner's products. Asking for the evidence which would support such an inference, the trial court said—"Now, I don't care whether it is inferential, circumstantial, pictorial, vocal, real or any other characterization of evidence. I want to see where it is. Where is the evidence that that has ever occurred, either direct evidence or inferential evidence, or circumstantial evidence?" (4245).

Petitioner's action was dismissed, not because it was limited to direct evidence but because neither presumptions from the Lexington judgment nor any other evidence offered by it—direct or circumstantial—would support a finding in its favor. In dismissing the complaint, the trial court had considered both direct and circumstantial evidence—"Clearly, there is no direct evidence of any communication by any of the defendants to any distributor * * * and the question then becomes whether or not there is evidence which would support an inference that these defendants, acting in combination, caused the tobacco distributors to refuse to deal in the products" (4284). On all the evidence, it concluded that such an inference "would be to the last degree irrational" (4284).

Petitioner tries to take advantage of Judge Clark's use of the words "direct evidence" in the opinion below (4294). Merely by this use of these words, Judge Clark certainly did not intend to overturn established law. It is abundantly clear from the context that "direct evidence," as there used by Judge Clark, referred to evidence, of whatever

character, which petitioner must offer in addition to and distinct from the Lexington judgment (4293-4):

> "*Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, has recently interpreted this [§5 of the Clayton Act] to mean that private suitors may avail themselves of the results of a criminal antitrust case only in regard to facts 'necessarily' adjudicated. Whatever the defendants would normally be collaterally estopped to deny is thus established *prima facie* by the admission of a previous criminal conviction. • • • But whatever is crucial to the treble-damage case and is not distinctly determined in the previous government suit must be proven by direct evidence. *Dipson Theatres* v. *Buffalo Theatres*, 2 Cir., 190 F. 2d 951, 958, certiorari denied 342 U. S. 926."

The *Dipson* case, cited by Judge Clark, itself involved the sufficiency of circumstantial evidence in a treble damage action.

Petitioner's counsel also used the term "direct evidence" in the same fashion at the trial to distinguish proof of the conspiracy by means of the Lexington judgment from other types of proof (134):

> "Mr. Handelman: If we should come in here and establish a conspiracy between the defendants by *direct evidence*, and we can do it, what we are then doing is waiving a special statutory privilege."

II. Petitioner Obtained From the Lexington Judgment the Maximum Advantage to Which It Was Entitled Under §5 of the Clayton Act

In ruling on the effect of the Lexington judgment, both courts have correctly applied the controlling principles laid down by this Court in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558.

Under §5 of the Clayton Act, as interpreted by this Court in the *Emich* case, a judgment in favor of the United States can be used as *prima facie* evidence only as to "matters respecting which" said judgment "would be an estoppel" between respondents and the United States (15 U. S. C. §16; 340 U. S., at p. 568). As this Court also held in the *Emich* case, it is the trial judge's task to limit to "the issues that were determined" in the prior suit "the effect of that judgment as evidence in the present action" (340 U. S., at p. 571). He must determine what was decided in the prior suit "upon an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the courts" (*ibid.*, p. 569).

The trial judge below followed that mandate. He studied the Lexington Information, the bill of particulars, the opening statement of Government counsel, the testimony of all witnesses indicated to him by petitioner's counsel, the closing statement of Government counsel, the Court's charge, the verdict, the judgment and the opinions on appeal, and he compared them with petitioner's treble damage complaint in the light of its answers to interrogatories propounded to it (173-6). There was, of course, no reference to petitioner in this, nor any testimony of any attempt to induce distributors to refuse to deal in any competing product (154-5). At the trial petitioner's counsel conceded that the Lexington judgment was not *prima facie* evidence that respondents had conspired to cause distributors to refuse to handle competing products of other concerns (2824-5).

The trial court concluded, however, that the Lexington judgment should be admitted to show that the respondents had combined for the purpose of excluding actual or poten-

tial competitors in tobacco but not that the respondents had actually excluded anyone or had the purpose to do so by causing distributors to refuse to deal in competitors' products.

This conclusion was in complete accord with the principles established by this Court in the *Emich* case:

First: The evidentiary use of a judgment of conviction under Section 5 of the Clayton Act is determined by reference to the general doctrine of estoppel. "Such estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution"—in other words, to "issues which were essential to the verdict" and "matters of fact and law *necessarily decided* by the conviction and the verdict on which it was based" (340 U. S., at pp. 568, 569).

Second: "A general verdict of the jury or judgment of the court without special findings does not indicate which of the means charged in the indictment were found to have been used in effectuating the conspiracy" (*ibid.*, p. 569).

Third: The prior judgment is not admissible as evidence of the "impact of the conspiracy." Even under the far stronger circumstances of the *Emich* case, the treble damage plaintiffs were required to introduce, "in addition to the criminal judgment, evidence of the impact of the conspiracy on them" (*ibid.*, p. 571).

The courts below could not possibly conclude that the Lexington judgment determined that respondents combined or conspired to cause distributors to refuse to handle petitioner's—or any other—products. No such issue was ever raised, much less litigated at Lexington.

There were four counts in the Lexington Information: (1) conspiracy in restraint of trade, (2) monopolization,

(3) attempt to monopolize, and (4) conspiracy to monopolize.

Each count of the Lexington Information claimed that respondents had used several identical "methods, means and practices" to effectuate their aims. There was a general verdict, after instructions that the jury need not find all the acts charged by the Government (142). "And since all of the acts charged need not be proved for conviction, * * * such a verdict does not establish that defendants used all of the means charged or any particular one" (340 U. S., at p. 569).

The five different methods specified in each count of the Information included two which dealt solely with leaf tobacco—as distinguished from "tobacco products," e.g., cigarettes (49-52, 55-6, 59-60, 63). Of 3,013 pages of testimony for the Government, 1,631 dealt solely with the leaf tobacco phase of the Lexington case. In that part of the trial judge's charge at Lexington which related to the specific evidence in the case, 3½ of 6½ pages concerned leaf tobacco exclusively.

The general verdict at Lexington could have been based entirely on these leaf tobacco charges. Hence it would establish nothing regarding the distribution of tobacco products and nothing concerning petitioner. Petitioner never purchased or owned any leaf tobacco (86-7, 103). Petitioner expressly disclaimed "that the impact of the conspiracy hits him in his leaf purchases" (149-50).

The three remaining methods charged in the Lexington Information related to the distribution of tobacco products. One method asserted that respondents pursued "a common policy" of fixing "the factory prices of their products" and another "a common policy" of fixing "the wholesale and retail prices of their own and other tobacco manufacturers' products" (50-2).

The general verdict at Lexington could have been based entirely on these charges—likewise wholly irrelevant here. Repeatedly petitioner disclaimed that it was in any way injured by price fixing (93-4, 106-7, 111, 113-5).

The remaining method charged in the Lexington Information referred, in general terms, to a "common policy" to dominate distributors of respondents' products so as to develop and maintain "a distributive mechanism favorable to their products and unfavorable to those of existing and potential competitors" (51). There is no way of determining that the Lexington jury decided anything with respect to this phase of the case because the jury verdict, under the Court's instructions, could have been "guilty" even if it had believed none of these charges.

It is significant, moreover, that even that part of the Lexington evidence concerned with distribution of tobacco products did not relate to petitioner's claim here that in 1939 and 1940 respondents caused distributors to refuse to handle a new, premium-priced brand. The Lexington evidence on distribution of tobacco products related only to alleged price-fixing activities in 1933 intended to meet the established competition of lower-priced, 10-cent brands which distributors freely carried. This Court, in reviewing this evidence at Lexington, noted that it was "circumstantial evidence of the existence of a conspiracy and of a power and intent to exclude competition coming from cheaper-grade cigarettes" (328 U. S., at pp. 804-5)—retailing at "several cents lower than the retail price for the leading brands of" respondents (*ibid.*, p. 806). Far from being new brands which distributors were being asked to handle for the first time, the sale of these 10-cent cigarettes had already "multiplied 30 times" between 1931 and 1932, "rising from 0.28% of the total cigarette sales of the country in June, 1931, to 22.78% in November 1932" (*ibid.*). Re-

spondents endeavored to have retailers maintain a price differential of not over three cents between their brands and the 10-cent cigarettes (*ibid.*, pp. 807-8), but at no time did respondents attempt to compel distributors to refuse to deal in these brands.

There was no proof at Lexington of exclusion of competitors. The charge of the trial court at Lexington did not require proof of an actual exclusion, and this Court assumed "that an actual exclusion of competitors • • • was not claimed or established by the prosecution" (328 U. S., at p. 787).

It is thus clear that the Lexington judgment, despite petitioner's argument here, did not "establish respondents' conspiracy to exclude competitors by controlling the distributive system" (Pet., pp. 15, 55). It is similarly evident, again despite petitioner's argument here, the Lexington jury "had found" no "ultimate facts" with respect to the distribution of tobacco products (Pet., p. 18).

Nor can anything said in either opinion on appeal from the Lexington judgment create findings where none existed. "In view of the jury's verdict," the Court of Appeals' consideration was limited "to determining whether there was substantial evidence to support the verdict" (147 F. 2d 93, 101). And the opinion of this Court was "not a finding by this Court one way or the other on the many closely contested issues of fact" (328 U. S. 781, 787).

It is plain that the Lexington judgment—involving methods which could not have affected petitioner—could not be submitted to the jury "to connect" respondents "causatively with the refusal of the distributors to handle" its cigarettes as now contended by petitioner (Pet., p. 4).

In the *Emich* case the jury verdict of guilty "was firmly rooted in a finding of coercive conduct on the part

of respondents toward General Motors dealers to force the use" of its subsidiary facilities and that conclusion was "necessarily found by the jury verdict in the criminal proceeding" (340 U. S., at p. 570). As the Court of Appeals pointed out below, the jury verdict at Lexington "cannot be said to be 'firmly rooted in a finding that coercive conduct on the part of respondents' • • • made impossible the marketing of [petitioner's] non-competing higher-priced cigarettes" (4296).

But even in these circumstances, plaintiffs in the *Emich* case, before they could prove a *prima facie* case, were obliged to demonstrate by independent evidence that the real purpose in cancelling those franchises was to further the conspiracy, notwithstanding that Emich had been a witness in the Government case and had testified to cancellation of his franchise.

Cancellation of franchises had been but one of several means alleged to have been used by the defendants to effectuate their conspiracy. Under the jury's general verdict in the criminal case, the use of that particular means could not be said to have been "necessarily decided." Hence, as this Court said (340 U. S., at p. 571):

> "To establish their prima facie case it therefore was necessary for petitioners only to introduce, in addition to the criminal judgment, evidence of the impact of the conspiracy on them, such as the cancellation of their franchises and the purpose of General Motors in cancelling them, and evidence of any resulting damages."

In the light of the holding in the *Emich* case, it is clear that the Lexington judgment would not fill the gaps in petitioner's case. No jury could infer, on the basis of that judgment alone, any impact of the conspiracy on petitioner.

III. The Lower Courts Properly Dismissed the Action As a Matter of Law

Petitioner argues that the lower courts invaded the province of the jury and urges that there was sufficient evidence to go to the jury ("Questions Presented," III (d) and (e); "Specifications of Errors," Nos. 23, 25 and 27; "Outline of Argument," par. 3).

In the petition ("Questions Presented," III (a); "Specifications of Errors," Nos. 11 and 15) it is urged that the lower courts made "assumptions of fact and created a presumption of innocence in favor of the defendants and distributors of cigarettes". Petitioner gives no record references to sustain this proposition, nor does it clarify its meaning. If by it petitioner means to state that the lower courts applied anything different from the usual rule that petitioner had the burden of proving a *prima facie* case, there is simply nothing in the record to support it.

It is misleading to suggest, as the petition does ("Questions Presented," I (c); "Specifications of Errors," No. 10), that petitioner had the burden to prove exclusion of others as part of its case. No such burden was ever placed on petitioner, and no such rule is even mentioned in the opinion below. In petitioner's only discussion of this point, at page 41 of the petition, record references are cited referring to colloquy between the trial court and petitioner's counsel. These merely refer to questions by the trial court as to whether there was any proof of exclusion of competitors. But these questions certainly point to no ruling that proof of exclusion of others was required.

Petitioner was afforded every opportunity and unlimited time to supply any competent evidence to connect respondents with the refusal of distributors to deal in its products.

Time and again, during the argument of the motions to dismiss, the trial court asked petitioner's counsel to point to any evide.. from which a jury could infer that respondents had in some way caused distributors to refuse to handle petitioner's products (4243-4, 4252, 4257, 4271-2). Petitioner pointed to no such evidence then and its brief points to none now.

Clearly, petitioner had not supplied that proof by testimony of the only two jobbers it called. One had not refused petitioner (1675-8). The other had refused because it felt petitioner's cigarettes "would not give us sufficient volume" and did not have "much chance for success" (1814).

That proof could not come from the Lexington judgment or from the second use of testimony or exhibits from the Lexington record. Even if repetition of Lexington testimony and exhibits would show "by circumstantial evidence *de novo* the same pattern of control and power and intent to exclude as had been established at Lexington" (Pet. Br., p. 55), it did not show that respondents ever caused distributors not to handle petitioner's or any other products.

There could be no inference of any causal connection from petitioner's proof of the naked fact that over a two-year period about 12 jobbers out of 6,000 distributors had refused to deal with it. Moreover, there was nothing in the experience of others from which any refusal to deal policy could be inferred. Petitioner's own evidence showed that distributors handled a variety of small brands (2832-3, 3350-2, 3489, 3544-6), including brands without burley tobacco, the supposed distinction claimed for petitioner's cigarette (3010, 3017). Petitioner further conceded that there was no evidence that the failure of any other brand

was caused by a uniform and compelled refusal on the part of distributors to handle the product (4251), or that any other company was prevented from having the benefit of distributive services (4253).

Dismissal of the action under these circumstances did not constitute an invasion of the province of the jury. The trial court was expressly applying the rule in *United States* v. *Sherman,* 171 F. 2d 619, certiorari denied *Grimaldi* v. *United States,* 337 U. S. 931. "The question, whether a judge shall submit the evidence to a jury for a verdict," in any case, civil or criminal, is "whether the evidence will rationally support a finding in favor of the party having the affirmative" (*ibid.,* p. 621).

On this record the Court of Appeals agreed that "dismissal was mandatory. *United States* v. *Sherman,* 2 Cir., 171 F. 2d 619, certiorari denied *Grimaldi* v. *United States,* 337 U. S. 931; *Brayer* v. *John Hancock Mut. Life Ins. Co.,* 2 Cir., 179 F. 2d 925; *Industrial Bankers Securities Corp.* v. *Higgins,* 2 Cir., 104 F. 2d 177" (4297).

There was nothing at all to support an inference of respondents' complicity in the distributors' refusals to deal. Any such inference "would be speculation run riot. Speculation cannot supply the place of proof" (*Moore* v. *Chesapeake & Ohio Railway Co.,* 340 U. S. 573, 578). As this Court said in *Galloway* v. *United States,* 319 U. S. 372, 395:

> "Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

Conclusion

No reason exists why this Court should review this case. The petition is singularly without merit and should be denied.

Dated: New York, N. Y.
October 14, 1952

Respectfully submitted,

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No. 339

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

MONTICELLO TOBACCO COMPANY, INC.,
Petitioner,

v.

THE AMERICAN TOBACCO COMPANY, AMERICAN SUPPLIERS, INC., PAUL M. HAHN, VINCENT RIGGIO, LIGGETT & MYERS TOBACCO COMPANY, JAMES W. ANDREWS and WILLIAM A. BLOUNT,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR LIGGETT & MYERS TOBACCO COMPANY, JAMES W. ANDREWS, AND WILLIAM A. BLOUNT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

MONTICELLO TOBACCO COMPANY, INC., *Petitioner,* *vs.* THE AMERICAN TOBACCO COMPANY, AMERICAN SUPPLIERS, INC., PAUL M. HAHN, VINCENT RIGGIO, LIGGETT & MYERS TOBACCO COMPANY, JAMES W. ANDREWS and WILLIAM A. BLOUNT, *Respondents*	No. 339

BRIEF FOR LIGGETT & MYERS TOBACCO COMPANY, JAMES W. ANDREWS, AND WILLIAM A. BLOUNT IN OPPOSITION

OPINION BELOW

The unanimous opinion of the Court of Appeals, Second Circuit, affirming dismissal of the complaint is reported at 197 F. 2d 629. The District Court wrote no opinion.

JURISDICTION

Petitioner invokes Section 347 (a) of former Title 28. This section was superseded in the Revised Judicial Code of 1948, 62 Stat. 928, 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioner urges that this Court review a unanimous affirmance by the court below of a judgment dismissing

the complaint on the merits at the close of petitioner's case for lack of any rational basis to support it.

Stripped of confused verbosity, the petition urges the following questions:

1. Whether, under Section 5 of the Clayton Act, 15 U. S. C. § 16, and the decision of this Court in *Emich Motors Corp. et al.* v. *General Motors Corp. et al.*, 340 U. S. 558, id., 945, petitioner was entitled to admission of a prior judgment, convicting respondents and others of Sherman Act violations, as *prima facie* evidence of facts not adjudicated in the prior case.

2. Whether the Court of Appeals denied petitioner recourse to circumstantial evidence to prove essential elements of its case which could not be established *prima facie* by estoppel.

3. Whether petitioner was prejudiced by the exclusion by the trial judge of certain evidence pertaining to damages.

4. Whether the quantum of evidence presented warranted submission of the case to the jury.

STATUTES INVOLVED

The pertinent provisions of the antitrust laws are set forth on pages 5-8 of the Petition.

STATEMENT

Petitioner and Its Alleged Cause of Action

Alleging it was injured in its business—the manufacture and distribution of tobacco products—by reason of respondents' violation of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1, 2), petitioner, hereinafter referred to as Monticello, sued for treble damages of $36,000,000 pursuant to Section 4 of the Clayton Act (15 U. S. C. § 15).

Its claim was that pursuant to conspiracy respondent tobacco companies, Liggett, American and American Suppliers, kept it from obtaining orders from tobacco distributors for its products.

The court below, in an opinion by Judge Clark, described Monticello as follows (4292-3)†:

> "Monticello Tobacco Company's moving spirit was one Richard Hartley. Its unhappy history began in 1938 with the issuance of a stock prospectus claiming that Hartley had had substantial experience in the tobacco field. The claims were false. Hartley had made an abortive attempt to market a 'Court' cigarette, manufactured for him by American Tobacco Company, during the early thirties; but otherwise there was nothing in his past as to either general business success or initiation into cigarette marketing. Nonetheless, some 16,666 shares of Monticello stock were marketed, resulting in a capital investment of $24,999.
>
> "With this, Hartley paid himself $8,300 in advances against his share of net earnings. He also purchased Monticello's inventory of 2,000 cartons of cigarettes and a small amount of pipe tobacco made to order for the company by Christian Peper Tobacco Company. This comprised Monticello's entire stock in trade during its active career; it never manufactured its own cigarettes. It was proposed to market the Monticello cigarette, without substantial advertising, by granting to buyers 5 per cent more discount than established brands offered and, in turn, to suggest an accordingly higher retail price. Hartley, however, was practically his own sales force and his plan met with little success. In the year 1939 he visited some five cigarette jobbers in New York; one placed an order. He also called

† Record references are to page numbers; petitioner's exhibits are referred to as PX, respondents' as DX, interrogatories propounded by Liggett before trial as Int., the petition as Pet. and petitioner's brief as Br.

on several retail stores, some of whom agreed to stock Monticellos; but, as Hartley testified, he did not pursue this outlet, preferring to market through distributors. In 1940 he visited seven jobbers in the Philadelphia-Washington area, but was unable to stimulate any interest, though again some retail concerns agreed to buy. Finally, late in 1940, Hartley sold a few cartons to chain stores in New York as a final gesture. The books of the corporation were closed in June, 1941. By that time, 706 of the 2,000 cartons purchased were unsold. Some scant sales of $511.83 had been recorded, it is true. But we cannot conclude from the record of the corporation that any sustained management effort was made to market Monticellos on a continuing or permanent basis."

Genesis of Complaint

The complaint originated in an anti-trust information filed by the United States at Lexington, Kentucky, on July 24, 1940 under which respondents and others were convicted by a general verdict. The judgment of conviction was affirmed by the Circuit Court of Appeals, Sixth Circuit (*American Tobacco Co. et al.* v. *United States,* 147 F. 2d 93), and by this Court on limited review, 328 U. S. 781. That case is referred to as the Lexington case.

Monticello annexed the Lexington information and judgment to the complaint (34-71) and asserts the right—as it has from the outset—to have the prior judgment operate by estoppel as *prima facie* evidence of the antitrust violations it alleges in this case.

Since Section 5 of the Clayton Act provides that a prior judgment shall be *prima facie* evidence only as to "all matters respecting which said judgment • • • would be an estoppel as between the parties thereto," analysis and comparison of the Lexington information and the complaint here are required.

Comparison of Complaint with Lexington Information

As at Lexington, respondents are charged with conspiracy in restraint of trade in tobacco under Section 1 of the Sherman Act, monopoly of such trade, and conspiracy to monopolize in violation of Section 2.

The factual specifications are similar to those in the information (pars. 20a to e; R. 14-8; Inf. par. 26a to e; R. 49-52), and fall into three categories:

1. Control by respondents of the purchase of leaf tobacco on auction markets to the injury of growers and other buyers, particularly by price-fixing (pars. 20a and b; R. 15; Inf. par. 26a and b; R. 49-50). *The leaf phase of Monticello's case was abandoned by answers to interrogatories propounded by Liggett before trial* (Int. D.3(b); R. 93, 106, 113-4). *It offered no evidence of leaf buying activities at the trial; and counsel conceded that the leaf phase of the Lexington case did not affect Monticello* (4243).

2. Restraining and eliminating price competition by fixing factory prices for their own products (par. 20c; R. 15; Inf. par. 26c; R. 50). *Plaintiff's counsel also disclaimed that identity of factory prices affected Monticello's attempt to sell its products* (Int. F. 2; R. 95, 107, 115).

3. Domination of distributors of tobacco products to secure a distributive mechanism favorable to respondents' products by *price-fixing* in the wholesale and retail markets (par. 20d and e; R. 16-18; Inf. par. 26d and e; R. 51-2).

As to distribution, Monticello's claim is based on the following allegations, none of which is found in the information: (*1*) that distributors to whom respondents sold direct were "favored" and "completely or substantially under the domination and control" of respondents, so that respondents were in a position to dictate whether they might deal in brands of others, including Monticello (cf. par. 17; R. 12; Inf. par. 23; R. 47), and (*2*) that the granting and withholding of favors to distributors depended on their compliance with respondents' instructions, thereby facilitating exclusion of others, including Monticello (cf. par. 20d and e; R. 16-17; Inf. pars. 26d and e; R. 51-2). Plaintiff claims that these asserted activities had the object and effect of excluding it from the market and driving it out of business (pars. 21, 30, 38; R. 18, 26, 31).

Thus the complaint differs in vital respects from the information. Monticello abandoned the leaf and factory price phases of its case, leaving only the claim that it was excluded from distribution channels—a claim wholly absent at Lexington (4246, 4256).

As we suggest here and demonstrate in the Argument, petitioner did not and could not suffer any injury by reason of any matter tried in the Lexington case, and there can be no estoppel.

Pre-Trial Proceedings

Answers to interrogatories addressed to Monticello in preparation for trial show that it relied on the conviction at Lexington, plus the refusal of 25 of the 6000 jobbers to buy Monticellos, to prove the conspiracy and to establish the causal connection between the conspiracy and the alleged injury (Int. D. 1, R. 91, 105-6, 110, 113-4; G. 4, R. 95, 107). It conceded that there was no independent evidence of Sherman Act violation (115, fol. 344).

Rulings on the Lexington Judgment

Ruling at the Outset

In the exercise of his discretion to control the order of proof, the trial judge refused to permit petitioner to refer to the Lexington judgment in the opening statement, or to offer it in the presence of the jury, reserving the right to admit it as the trial progressed (R. 176-7).

Admission for Limited Purpose

In the third week of trial counsel was permitted to question respondents Andrews, Riggio, and Hahn concerning their conviction in the Lexington case (877 *et seq.*, 898, 917, 1121-2); the Court instructed the jury that answers bore on credibility (899-901, 918)—the only basis for which the testimony was offered (887, fol. 2661).

Near the end of the trial the Court allowed the Lexington judgment in evidence for a limited purpose, instructing the jury (3292-6) that it might be considered as "evidence of what the defendants had done in other spheres of their business"; that it was "evidence only that the defendants combined for the purpose of excluding actual or potential competitors . . . other than Monticello . . . by means of price-fixing and not by causing distributors to refuse to deal . . . with Monticello or with anyone else . . ."; that "it does not establish that the defendants actually excluded anyone, even by . . . price-fixing" (a fact admitted by counsel for petitioner, 160, 4246, 4256).

• • • • •

At the close of petitioner's case the trial court granted respondents' motion to dismiss the complaint for lack of any rational basis to support the claim that the refusal of distributors to deal with Monticello was caused by respondents (4284).

warehousemen, and leaf dealers as traders who might have been the objects thereof; (*2*) identity of the list prices of respondents' popular brands and changes therein, which could have affected only the respondents; and (*3*) distribution of cigarettes by manipulating *retail* prices (not distribution by wholesale concerns) so as to prejudice the manufacturers of ten-cent cigarettes.

Monticello could not have been injured as a result of any transactions by respondents in the leaf marketing or price identity phases of the Lexington case; it abandoned them. This left only the distribution phase of the Lexington case as one which could possibly have affected Monticello.

The distribution aspects of Lexington and this case are completely different. Even as amplified by the bill of particulars, the Lexington information alleged only that distributors were under real or assumed obligations to respondents, through which the latter could have exercised dominion over the *price* policies of distributors, not over their freedom to buy or refuse to buy any particular brand (Lex. Rec., p. 132-3). There is not an iota of evidence in the entire record, either here or at Lexington, that respondents attempted to devise or apply any method or machinery for censoring the shelves of wholesalers.

Further, the means alleged and particularized at Lexington show that the domination bore only on prices of *retail* dealers; the evidence touched on in the Supreme Court opinion (328 U. S., p. 807-8) concerned only *retail* pricing (PX 32 Id., 56 Id., 57 Id.). By contrast, Monticello's claim relates to the exclusion of its product by a handful of wholesalers allegedly under respondents' control, a wholly different matter not even referred to at

Lexington. Counsel conceded that Monticello was not affected by retail prices (4243).

The *Emich* case involved only *one* trade—General Motors automobiles; *one* class of traders—G. M. dealers—whose trade was restrained; *one* object—monopolization of the financing of G. M. cars; and *one* method of effectuation—coercion of G. M. dealers. There were a number of specifications in the indictment and some evidence relating thereto, but all added up to coercion by G. M. of its dealers to use GMAC financing. It was this *one* issue as to which estoppel resulted.

By contrast the Lexington judgment not only is *not* an estoppel; it is predicated on charges separate and distinct from Monticello's claims. Unlike the situation in the *Emich* case, two different conspiracies—two different courses of conduct—were present in the two cases.

The trial judge did admit the Lexington judgment "for the limited purpose of showing respondents had conspired to exclude competition by price-fixing, but not that this conspiracy had caused plaintiff's collapse." (4291) This afforded petitioner the maximum benefit to which it was entitled. Cf. *Milgram et al.* v. *Loew's Inc. et al.*, 192 F. 2d 579 (C. A. 3d 1951), cert. den. 343 U. S. 929 (1952); Fn 8 to *Emich* decision, 340 U. S. 558, 571. Even with this benefit petitioner failed to prove the conspiracy charged or any impact of past price-fixing collusion upon it. In the circumstances the prior judgment was not a substitute for independent proof. *Dipson Theatres, Inc.* v. *Buffalo Theatres, Inc.*, 190 F. 2d 951 (C. A. 2d 1951), cert. den. 342 U. S. 926 (1952).

Petitioner urges it is entitled to the benefit of certain "ultimate" facts "found" by this Court in the Lexington

case. This Court made no such findings; it prefaced its discussion of the Lexington case with the remark that "The present opinion is not a finding by this Court one way or the other on the many closely contested issues of fact" (328 U. S. p. 787). Remarking (p. 790-1) that it was difficult, in view of the "many variations in the business activities" of the defendants, to state which "did each of the acts mentioned", so that mention of defendants meant "some or all" of them, it referred to some of the evidence, and concluded: "It was on the basis of such evidence that the Circuit Court of Appeals found that the verdicts of the jury were sustained by sufficient evidence on each count" (328 U. S. p. 808). Contrary to petitioner's contention (Pet. 18-9), there were no "findings" by this Court or by the Circuit Court of Appeals, Sixth Circuit.

While both appellate courts indicated that, taking the view of the evidence most favorable to the Government, there was support for all three aspects of the Lexington case, the fact remains that *any one alone sufficed to support the verdict.* Hence there can be no estoppel as to any of them any more than there is an estoppel as to means and acts.

II

The Court of Appeals Decision Is Not in Conflict With or a Departure From Other Decisions of this Court or of the Courts of Appeal.

Petitioner urges that the decision of the Court of Appeals requires a treble damage plaintiff to establish its case without recourse to circumstantial evidence (Pet., pp. 2, 9, 49; Br. 54-6). It infers this from a statement of the court (4294) that:

> ". . . whatever is crucial to the treble-damage case and is not distinctly determined in the previous government suit must be proven by direct evidence . . ."

The claim that the court below denied petitioner the benefit of circumstantial evidence is a distortion resulting from reading a single sentence of the opinion out of context. The key to the court's meaning, as indeed to its very decision, is its statement in a prior paragraph (4293):

> ". . . the mere fact of conviction cannot make the major tobacco manufacturers liable for every business casualty in the cigarette field."

and its holding (4297):

> ". . . Absent a showing of causal connection between the collusion and the jobbers' refusal to handle plaintiff's product, dismissal was mandatory. . . ."

Clearly the court did not use the technical legal phrase "direct evidence" as distinguished from "circumstantial evidence". It rather employed the adjective "direct" as meaning "bearing straight upon the object" (Webster's New International Dictionary, Second Ed.), the object being the connection between past collusion and petitioner's failure. It had stated the basis upon which *prima facie* evidence is available by estoppel, and was merely distinguishing that type of ready-made proof from the "showing" required when estoppel is not available.

Neither directly nor by implication did the court preclude circumstantial evidence as proof in treble damage cases. Obvious as this is, any possible doubt is resolved (*1*) by the court's citation of the *Dipson* case (190 F. 2d 651) immediately following the sentence complained of—a case where plaintiff relied on circumstantial evidence in the absence of estoppel, and, (*2*) by its citation of cases (4297) requiring dismissal where there is no rational basis to support an inference in favor of a plaintiff's case. Judges A. N. Hand and Clark participated in the decisions in the *Dipson* and *Monticello* cases.

Laying semantics aside, the fact is that Monticello, after eleven weeks of trial, could show no impact of the Lexington price-fixing conspiracy on it, nor—independently—any conspiracy to exclude it. It relied on estoppel and, so doing, necessarily failed for reasons stated above in Point I.

The trial court granted the motion to dismiss at the close of petitioner's case after lengthy argument (4178-4283). Petitioner conceded that it had no independent proof of anti-trust violations on the part of respondents outside the Lexington judgment (115, fol. 344) and that there was no proof of exclusion of a competitor at Lexington (4246) even by price-fixing (4256). The court below properly required "a showing" of impact, which petitioner was unable to furnish. In accordance with decisions of this Court, it refused to allow speculation as a substitute for probative facts. *Moore, Adm.* v. *Chesapeake & Ohio Railway Co.*, 340 U. S. 573 (1951); *Galloway* v. *United States*, 319 U. S. 372, 395 (1943).

The point urged by petitioner has no merit and could have no possible bearing on the outcome of its case.

III

The Striking or Excluding of Testimony Relating to Speculative Damages is Academic.

Testimony of Tennant on speculative damages was stricken; that of Riggio for the same purpose, excluded. We refrain from discussing the rulings of the trial court in these respects because they are academic. Petitioner failed to establish its case; the question of damage is therefore moot.

IV

Dismissal Was Mandatory in Absence of Rational Basis to Support Claim of Exclusion.

At the close of plaintiff's case, in the eleventh week of trial, defendants' motion to dismiss under Rule 41(b) was granted after lengthy argument (4178-4283), the court stating (4284):

> "Clearly, there is no direct evidence of any communication by any of the defendants to any distributor, either those alleged to have been visited by Hartley or anybody else, and the question then becomes whether or not there is evidence which would support an inference that these defendants, acting in combination, caused the tobacco distributors to refuse to deal in the products.
>
> "I have carefully reviewed my own notes, I have carefully reviewed the testimony, and I have considered all of the points called to my attention yesterday by the plaintiff's counsel, and I conclude that it would be to the last degree irrational for this jury or any jury to conclude from the evidence here that the distributors' refusal to deal with Monticello was caused by these defendants."

Petitioner urges that evidence adduced without benefit of estoppel sufficed to create an inference that respondents caused distributors to refuse to deal with Monticello, and that the issue of exclusion should have been submitted to the jury.

A resume of the facts contained in the opinion of the Court of Appeals is set forth above at page 3. Additional facts had a bearing upon the result.

Other than itinerant service as a retail tobacco salesman, Hartley had engaged in four personal enterprises since 1917. All were failures. A retail tobacco store he opened in 1917 had no earnings after 1919 (2625, 2762). He then opened a similar enterprise which wound up in receivership within a year, leaving unsecured creditors unpaid (2381, 2477, DX X, Z). Hartley then claimed to have reentered the leaf business, in which he had been engaged as a youth, but admitted that he spent over two years of this period in a Federal penitentiary for grand larceny (2480-2). In 1925 he opened a "luncheonette, candy and cigar store" in New York which ended in bankruptcy in about four months (2390-2 et seq., 2484, DX I, O).

He organized Court Tobacco Company in 1930 with a stock of 500,000 cigarettes (2485-7) which he described as inferior in appearance and quality (2494, 2500, 2632), but which he nevertheless gave away in the period 1932-8 (a period otherwise unexplained except that he had no income from the tobacco business) to build goodwill for the forthcoming Monticello (2516-8, 2634). In the fraudulent stock-selling prospectus which launched Monticello he claimed sales of 13,500,000 Courts—13,000,000 more than his supply.

The Monticello cigarette was represented in the prospectus to be the product of "much time and effort spent by some of the best experts in the tobacco industry" (DX K, p. 2), although Hartley claimed personal authorship on the stand (1969, 1979).

The illusion of originality was dispelled by the testimony of the manufacturer, Christian Peper, who supplied one lot on a "spot cash" basis (PX 114, 3008). Peper

testified that Hartley's "formula" was unworkable and meaningless (3014-9), that Hartley showed no special knowledge of blending (3009, 3016), and that Monticellos, a premium priced brand, were no different from "the ordinary run of blended cigarettes" (3010, 3017) which had consumer acceptance (3017) at popular prices.

Hartley's promotional and sales efforts were ill-conceived and poorly executed. No distributor approached by Monticello gave any reason for refusal to deal in its product which implied wrong-doing on the part of respondents (Int. G16; R. 98-9, 107).

Hartley stated he "didn't have any program for any advertising at all" (2244). Monticello's promotional effort was limited to some sampling of consumers, advertising inserts (PX 2A), and visits to a very small number of retailers and distributors.

As stated in the prospectus, it was "not the purpose or intention of the Company to compete with the current popular brands" (DX K, p. 4). Hartley did not intend to push sales vigorously himself but only to "spend a few days in each city helping the jobbers in obtaining the initial orders from the retailers, after which the jobbers will promote the sales through their own sales force" (DX K, p. 3). The proof bears out this representation of half-hearted salesmanship. Monticello had but three paid salesmen who worked from four days to three weeks. Its total sales payroll was $82.

Of 6,000 distributors in the United States, Monticello attempted to market through 13 of them; it chose to call to the stand only *one* jobber and its subsidiary, *one* chain, and Faber, Coe & Gregg. None of them supported Monti-

cello's claim of exclusion. Metropolitan thought Monticello showed no prospects of volume sufficient to indicate profitable business (1814). Faber, Coe & Gregg, not a jobber of cigarettes, purchased Monticellos until two months prior to Monticello's last sale (2242, PX 131, DX E), and ordered them as late as December 1941 (PX 102) when Monticello was dormant. It filled all bona fide orders (1676, 1735-6). United Cigar-Whelan was not examined concerning petitioner's efforts to market its products (1955-63), and Metropolitan's subsidiary did not even bother to forward orders to its parent (1446-7).

Ten distributors listed among a total of 25 jobbers and chains who refused to deal in Monticellos had local addresses (Int. G4; R. 95, 107), but none was called. Of the 6 firms which did purchase Monticellos (Int. G5; R. 96, 107), only Faber was called. None of nine out-of-state jobbers whose depositions were taken by respondents was produced.

The record discloses that three isolated efforts to obtain wholesale distribution were made by Hartley:

1. Beginning April 24, 1939 Hartley went to see Faber and Metropolitan (1989, 2038). Also called on were several other local jobbers, Packer, Green, Rabinowitz, and T. Miller, all approached at about the same time (2091-3), none of whom Hartley asked to fill orders (2093). This effort lasted until after an Albany trip in the fall of 1939 (2052).

2. Almost a year later Hartley made a trip of about ten days' duration to see six jobbers in Philadelphia, Baltimore (2084-91), Norfolk, Washington (2070-82), and Richmond (2065-71).

3. The final effort was confined to the period July 12 to 26, 1940, when Hartley approached certain

chains: Schulte (2101-3), Union News (2103-5), United Cigar-Whelan (2093-8), and Liggett Drug, where there was a single request for Monticellos in one store (2098-2100).

These facts, all of which are uncontradicted, left no rational basis upon which the jury could have inferred that respondents, by conspiracy, caused distributors to refuse to deal with Monticello. The trial judge properly granted the motion to dismiss under Rule 41(b) of the Federal Rules of Civil Procedure. *United States* v. *Sherman et al.*, 171 F. 2d 619 (C. A. 2d 1948); *Myers* v. *Reading Company*, 331 U. S. 477 (1947); *Galloway* v. *United States*, cit. *supra*.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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